FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

APPELLANT'S REPLY MEMORANDUM

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FEBRUARY 29, 1980

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OTHER REFERENCES

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ARGUMENT

I

THIS APPEAL SHOULD BE HEARD

Appellees acknowledge that "[i]nstrumentality cases require apportionment."[1] Since the early development of the instrumentality of commerce doctrine, the archetypal instrumentality has been a railroad car employed in interstate transportation. In interpreting the Florida statutes at issue, the Trial Court below recognized this and determined that "under the Constitution of the United States the tax must be an apportioned tax . . . ." (A. 13a-14a). Indeed, until the decision on appeal here, the unwavering line of authority in this country held that railroad cars are instrumentalities of commerce.[2]

The District Court of Appeal below, however, without pausing to explain, found that Ringling Bros.' railroad cars were to be treated as commodities. Like the District Court, appellees simply declare, *ipse dixit,* that Ringling Bros.' railroad cars and the other property at issue are commodities, citing cases dealing with tires, mechanical pens, sheep and other goods traded in commerce. The logical extension of this faulty argument is that Ringling Bros.' railroad cars and the other property at issue would be taxable at full value in each of the approximately 35 other states in which the circus performs because they are "commodities" which, while present in each such state, have stepped out of the "stream of commerce."

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[1] Appellees' Motion to Dismiss, p.7.

[2] Not one United States Supreme Court case dealing with state taxation of railroad cars employed in interstate transportation has ever treated them as commodities. *See, e.g.,* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); New York *ex rel.* New York Central & H.R.R.R. v. Miller, 202 U.S. 584 (1906); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919); Johnson Oil Ref. Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933); Central R.R. v. Pennsylvania, 370 U.S. 607 (1962); Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968).

The decision below treating Ringling Bros.' railroad cars as commodities and refusing to require apportioned taxation by a nondomiciliary state is so utterly at odds with previous unbroken authority that, if it goes uncorrected, it subverts established due process and commerce clause doctrine. No other state has treated railroad cars the way Florida has in the decision below. If Florida's radical departure from established constitutional doctrine goes unreviewed, courts and officials of other nondomiciliary states will surely feel that they too are permitted speciously to characterize property as a "commodity" solely in order to achieve a predetermined, parochial result. The ultimate effect will be multiple taxation of other companies operating in interstate commerce.

II

RINGLING BROS. RAISED AND PRESERVED THE FEDERAL QUESTIONS BELOW

Appellees acknowledge that Ringling Bros.' complaint challenges the constitutionality of the statutes at issue[3] but they assert the questions were not preserved on appeal to the District Court of Appeal because Ringling Bros. "merely sought to establish a partial exemption from taxation, by urging an apportionment formula."[4] Appellees try to obscure the fact that the apportionment argument is the embodiment of the constitutional questions in this case. From the beginning, Ringling Bros.' position has been that the due process and commerce clauses require apportionment and that if the statutes at issue are not construed so as to require apportionment, they are unconstitutional.[5]

The Jurisdictional Statement, at pages 10 and 11, shows that Ringling Bros. vigorously raised and steadfastly preserved the constitutional issues. Appellees' own appendix reinforces

[3] Appellees' Motion to Dismiss, p.2.

[4] Appellees' Motion to Dismiss, p.3.

[5] *See, e.g.,* the "Legal Issues to be Tried" section of the Stipulation for Pre-Trial Order (¶29, subpara. 2) filed by the parties in the Trial Court which sets forth the due process and commerce clause claims. (A. 26a).

this. It sets out the table of contents of Ringling Bros.' briefs on appeal to the District Court and shows that Ringling Bros. argued in Point I of its main brief that the property at issue "may only be taxed on a fair, apportioned basis" (A.A. 2a), and in its reply brief it argued that "under the due process clause of the Fourteenth Amendment to the United States Constitution . . ." apportioned taxation is required. (A.A. 4a). Similarly, Ringling Bros.' brief to the Florida Supreme Court addresses "the validity of sections 192.011 and 192.032(2) of the Florida Statutes." (A.A. 5a).[6]

Appellees overlook that the Trial Court sustained Ringling Bros.' position that in order to be constitutional these statutes had to be given a limiting construction requiring apportionment. Having obtained this construction, Ringling Bros.' main argumentative thrust, as appellee in the District Court, was to preserve that ruling. For Ringling Bros., as appellee, to have challenged statutes construed in its favor on the ground that they were unconstitutional would have been absurd. Yet appellees argue that in not doing so, Ringling Bros. failed to preserve the constitutional questions! Appellees' argument stands common sense on its head.

III

APPELLEES MISCONCEIVE THE FEDERAL QUESTIONS PRESENTED

As clearly appears from the "Questions Presented" section of the Jurisdictional Statement, the question whether the court below erred in finding that the property at issue had acquired a tax situs, *i.e.,* was "permanently located" in Sarasota County, Florida, is not raised to this Court. Thus, contrary to the apparent theme of appellees' Motion to Dismiss, the conclusion reached below concerning the meaning of the term "permanently located" is not at issue.

[6] The reference to the "Constitution" in subpoint C of Point I of Ringling Bros.' brief to the Florida Supreme Court (A.A. 5a) is to the United States Constitution.

The questions presented, however, challenge the determination below that Ringling Bros.' railroad cars and other property are commodities which have left the stream of commerce.[7] The issue is whether Florida, as a nondomiciliary state, is required by the Constitution to apportion its tax on the property at issue, or whether it may, like Humpty Dumpty in *Through The Looking-Glass,* simply declare that the property is what appellees choose to say it is and thereby avoid the dictates of the Constitution.[8]

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[7] This determination is not, as appellees assert, a finding of fact. Nor is it supported by substantial evidence. Appellees point to no facts or other evidentiary support in the record for their assertion. The treatment of Ringling Bros.' railroad and other properties as "commodities" is an ultimate legal conclusion with direct constitutional consequences and the classification itself raises constitutional questions.

[8] *See* L. Carroll, *Through The Looking-Glass* 79 (Macmillan 1966):

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

CONCLUSION

Appellees' Motion to Dismiss this appeal should be denied and the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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February 29, 1980